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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MIGUEL C., a Person Coming Under
the Juvenile Court Law.

B211534

(Los Angeles County
Super. Ct. No. FJ43513)

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL C.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Cynthia Loo, Referee. Affirmed and remanded with directions.

Nancy K. Udem, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Miguel C., a minor, appeals from an order of the juvenile court declaring him to be a ward of the court under Welfare and Institutions Code section 602¹ and placing him in the Camp Community Placement Program. Appellant contends that there was insufficient evidence of his present ability to commit an assault with a firearm. He also contends that the court failed to exercise its discretion to determine whether his offense was a felony or a misdemeanor. We reject the former but agree with the latter contention. We therefore affirm the judgment but remand for the juvenile court to make a finding concerning whether the offense is a felony or a misdemeanor.

BACKGROUND

A petition under section 602 was filed, alleging that Appellant committed the crime of assault with a firearm on Raul A., in violation of Penal Code section 245, subdivision (a)(2). The petition described the offense as a felony.

In June 2008, Raul A. was walking home from his high school with Mauricio C. and another friend, when he saw Appellant and C.A.M.² with a group of people. Raul A. was familiar with Appellant because Appellant used to attend Raul A.'s school. C.A.M. and Raul A. went to the same school, but did not associate with one another. Appellant and his group started walking behind Raul A. and his friends.

Mauricio heard the people following them say, "Fuck G2F" multiple times. "G2F" stands for "Get Two Fade," which is a tagging crew. At one time, Raul A. had been a member of G2F. Mauricio also heard the group behind them saying that they wanted "to fight one on one."

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Two witnesses in this case, who are brothers, have the same first and last names. Therefore we include middle initials. C.A.M. refers to the younger brother and C.M.M. refers to the older brother.

Raul A. and his friends started walking faster toward Raul A.'s house. They came to the next street and crossed it, and then a car pulled over with four or five people inside. Appellant was in the back seat of the car. C.A.M. and his brother C.M.M. also were in the car. The people in the car said to Raul A., "Well let's get down," which Raul A. understood to mean they wanted to fight. They also said, "Fuck this." Raul A. heard C.A.M. yell, "Fuck G2F," two times.

Appellant and the others got out of the car. Raul A. saw Appellant holding a black handgun. Appellant was standing about 20 feet away from Raul A., with his left arm held out horizontally, about shoulder height. The handgun was pointed at Raul A. Appellant did not say anything. The others with Appellant were "screaming, 'Fuck G2F.'" Raul A. was scared.

Raul A. and his friend Mauricio ran back to their school and went into the office. They told the school principal what happened and she called the police. Los Angeles Police Department officers responded to the school and interviewed Raul A. and Mauricio. Raul A. and Mauricio both told an officer that Appellant pointed a handgun at Raul A. The officers took Raul A. to a field show-up where he identified Appellant as the person who had pointed the handgun at him. Raul A. told the police that there was "trouble" between G2F and other tagging crews. He also told the police that Appellant was a member of a tagging crew called "Krazy Street Felons."

Raul A. provided the license plate number of the car Appellant was riding in. The police responded to the address of the registered owner of the car. Appellant was at that location, and he was arrested. The police did not find a handgun.

At the adjudication hearing, Raul A., Mauricio C. and a police officer testified for the prosecution.³ C.M.M. and C.A.M. testified for the defense. C.M.M. acknowledged that he was driving in a car with his brother (C.A.M.), Appellant and another friend, and that he pulled the car over when they saw Raul A. and his friends and heard them yelling profanities. C.M.M. had picked up his brother from school—the same school Raul A.

³ Their testimony was summarized above.

attended. According to C.M.M., Raul A. was with a group of about 10 males, among whom were some boys who had been bothering C.A.M. to join their tagging crew, G2F. C.A.M. believed that Raul A. was a member of G2F. C.A.M. testified that he and Appellant had been members of the tagging crew K.S.F. (Krazy Street Felons), but not at the time of this incident. The four males got out of the car to confront the group, but did not have a chance to say anything before Raul A. and his friends ran away laughing and “flipping [them] off.” Neither C.M.M. nor C.A.M. saw Appellant with a gun. They claimed that police contacted them as they were walking away from the school, and searched all of them, including Appellant, shortly before they confronted Raul A. and his friends. The police did not search the car. There were some construction tools, including a hammer, in the car, but neither brother saw Appellant holding any of the tools. On rebuttal, a police officer testified that, after his arrest, Appellant stated that he found a hammer in the car and held it like a gun, and “it might have been confused for a gun.”

In closing argument, Appellant’s counsel argued that there was insufficient evidence establishing that Appellant “held” a gun.” The juvenile court sustained the petition and declared Appellant a ward of the court pursuant to section 602. The court ordered Appellant placed in “a midterm camp program” for a period not to exceed four years, and commented that there was “the possibility of early release as early as three months with exceptionally good behavior.”

DISCUSSION

I. Sufficiency of the Evidence

Appellant contends that the juvenile court erred in sustaining the petition because there was insufficient evidence demonstrating that he had the “present ability” to commit an assault with a firearm. We disagree.

Penal Code section 240 defines assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Appellant argues, if the gun was not loaded or operable, he did not have the present ability to commit an

assault with a firearm under Penal Code section 245, subdivision (a)(2). As our Supreme Court has acknowledged, “A long line of California decisions holds that an assault is not committed by a person’s merely pointing an (unloaded) gun in a threatening manner at another person.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3.) “The threat to shoot with an unloaded gun is not an assault, since the defendant lacks the present ability to commit violent injury.” (*People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.)⁴ Appellant challenges the sufficiency of the evidence indicating that the firearm was loaded or operable.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ““Although it is the duty of the jury to acquit a defendant if it finds the circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,], which must be convinced of the defendant’s guilt beyond a reasonable doubt. ““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding

⁴ There is no evidence that Appellant attempted to use the gun as a club or a bludgeon. (*People v. Fain, supra*, 34 Cal.3d at p. 357, fn. 6 [“even an unloaded gun can be used as a club or bludgeon”].)

does not warrant a reversal of the judgment.”” [Citations.]”” [Citation.]” (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.)

Appellant focuses on the fact the police did not find a gun. Circumstantial evidence may be sufficient to prove an assault with a firearm. (See *People v. Rodriguez, supra*, 20 Cal.4th at pp. 11-14.) Evidence of a defendant’s conduct may be used to prove that a gun was loaded or operable. (See *People v. Rodriguez, supra*, 20 Cal.4th at p. 13.) “‘The acts and language used by an accused person while carrying a gun may constitute an admission by conduct that the gun is loaded.’ [Citations.]” (*Ibid.*)

Here, there was evidence that Raul A., at one time, belonged to the tagging crew, G2F. G2F had “trouble” with other tagging crews. Appellant and C.A.M., at one time, belonged to the tagging crew, Krazy Street Felons. Appellant and C.A.M. followed Raul A. and his friends on foot, with C.A.M. yelling, “Fuck G2F.” Then, four young males, including Appellant and C.A.M. pulled up next to Raul A. in a car and said they wanted to “get down,” or fight. The four males got out of the car. Appellant was carrying a handgun and he raised his arm horizontally at shoulder height and pointed the gun at Raul A. As Appellant pointed the gun at Raul A., Appellant’s associates were shouting, “Fuck G2F.”

The prosecution presented substantial circumstantial evidence from which the juvenile court could have inferred that the handgun Appellant was holding was loaded and operable. Appellant and his associates indicated that they wanted to fight Raul A. and his friends. They did not merely yell this from a distance or from the safety of a moving car. They pulled up next to Raul A. and his friends and escalated the confrontation by exiting the car. Appellant’s body language indicated that he was prepared to use the gun. He held his arm straight out in front of him and aimed the weapon at Raul A. The fact that Appellant was standing 20 feet away from Raul A. does not negate Appellant’s present ability to commit a violent injury on Raul A., as Appellant argues. Appellant also highlights the fact that neither Raul A. nor Mauricio heard Appellant say anything as he pointed the weapon at Raul A. Appellant’s associates, however, were yelling at Raul A. and his friends, and saying, “Fuck G2F.” The evidence

indicates that Appellant and his associates were attempting to provoke a violent confrontation.

Moreover, portions of the defense evidence support the prosecution's theory that the gun was loaded. According to C.M.M.'s testimony, Raul A. was in a group of 10 males. C.M.M. wanted to confront some of the people with Raul A. because they had been bothering his little brother. C.M.M. was only with three other people. Yet they got out of the car, even though they claimed that Raul A. and his friends were shouting profanities at them. The confidence of four males, in confronting 10 males, makes sense if one of the four is carrying a loaded firearm.

There is substantial evidence demonstrating that Appellant had the "present ability" to commit an assault with a firearm on Raul A.

II. Determination of Felony or Misdemeanor Offense

Section 702 provides, in pertinent part, that "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." The rule implementing section 702 states that, "[i]f the offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and must expressly declare on the record that it has made such consideration and must state its finding as to whether the offense is a misdemeanor or a felony." (Cal. Rules of Court, rule 5.790(a)(1); see also Cal. Rules of Court, rule 5.780(e)(5).)

In *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy*), the California Supreme Court held that this requirement is mandatory and the juvenile court's failure to make an express declaration that an offense is a felony or a misdemeanor required remand for compliance with section 702. (*Id.* at p. 1204.) The Court discussed the potential future harm to a juvenile from a felony determination, particularly in light of the Three Strikes Law, and stressed that the requirement of an express determination "serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702." (*Id.* at p. 1207; see *id.* at p. 1209 [describing a felony adjudication as a ""blight upon the character"" and ""serious impediment to

the future”” of a minor].) The Court explained that remand for an express declaration is not necessary where the record demonstrates that “the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler.” (*Id.* at p. 1209.)

Assault with a firearm is a so-called “wobbler” offense, punishable as either a felony or a misdemeanor. (Pen. Code, § 245, subd. (a)(2).) The People point out that the section 602 petition alleged that Appellant committed the crime of assault with a firearm and described it as a felony. The Court in *Manzy* specifically emphasized that “[t]he mere specification in the petition of an alternative felony/misdemeanor offense as a felony has been held insufficient to show that the court made the decision and finding required by [Welfare and Institutions Code] section 702. [Citation.]” (*Manzy, supra*, 14 Cal.4th at p. 1207.) This is because “the preparation of a petition is in the hands of the prosecutor, not the court.” (*In re Ricky H.* (1981) 30 Cal.3d 176, 191, superseded by statute on other grounds as noted in *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396.)

The People also point out that the adjudication/disposition order “declared” the offense to be a felony. And the People assert that the midterm camp placement “necessarily implied the court considered the offense a felony.” The People’s reliance on these circumstances is misplaced. As the Court explained in *Manzy*, “neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony.” (*Manzy, supra*, 14 Cal.4th at p. 1208.)

Nothing in the record demonstrates that the juvenile court considered whether the offense should be a felony or a misdemeanor or that the court was aware of its discretion to make that determination. Accordingly, we remand the matter for the Court to make the express declaration required by section 702.

DISPOSITION

The cause is remanded for the juvenile court to make an express finding on the record concerning whether Appellant's offense is a misdemeanor or a felony. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.